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No. 05-1240

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE WALLACE

Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO AND EUGENE ROY,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER ANDRE WALLACE

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REPLY BRIEF FOR PETITIONER

I. Accrual of Petitioner's Claim Is Controlled by *Heck v. Humphrey*

Respondents agree that the Court set out a rule of accrual for §1983 actions in *Heck v. Humphrey*, 512 U.S. 477 (1994), but offer a variety of insubstantial reasons why the *Heck* rule should not apply to this case.

A. Respondents Misconceive the Core Holding of *Heck v. Humphrey*

Respondents attach talismanic significance to the Court's use in *Heck* of the phrase "necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487. In respondents' view, the word "necessarily" limits the *Heck* accrual rule to Fourth Amendment claims which, if successful, would negate an element of the offense charged. (Resp.Br. 24.) The Court should reject this erroneous reading of *Heck*.

The core of *Heck* is "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. When success on a §1983 damage claim would "necessarily" imply the invalidity of a criminal conviction, the §1983 claim does not accrue until the criminal judgment has been set aside, either on direct appeal, in collateral proceedings, or through executive order. *Id.* at 486-87. Although, as respondents note, the Court in *Heck* discussed several hypothetical cases to illustrate "necessarily," 512 at 486-87 nn.6-8, the Court's use of the word "necessarily" is best defined by the facts on which *Heck* was decided.

The petitioner in *Heck* claimed that defendants "conspired and/or acted in concert" to subject him to "an illegal investigation" of his wife's death, "in

violation of the Fourth and Fourteenth Amendments to the United States Constitution." *Heck v. Humphrey*, No. 93-6188, Joint Appendix 3-4. Although the petitioner did not assert that success on this "illegal investigation" would negate an element of the offense, the district court and the court of appeals had viewed Heck's complaint as "challenging the legality of his conviction." *Heck*, 512 U.S. at 480 n.2. While the petitioner sought, in his reply brief in this Court, to dispute this view of his claim, the Court "accept[ed] the characterization of the lower courts" that success on the claim of "illegal investigation" would impugn the criminal conviction.[1] *Id.* Thus, even though Heck sought to disavow any attempt to negate an element of his offense, the Court held that Heck's cause of action would not accrue unless and until his conviction was set aside.

Respondents' reliance on "necessarily" is also inconsistent with the Court's post-*Heck* decision in *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam). There, the Court used "implicitly" in the place of "necessarily," stating:

> In *Heck v. Humphrey*, 512 U.S. 477 (1994), we held that where success in a prisoner's §1983 damages action would *implicitly* question the

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1. Respondents are therefore in error in asserting that Heck "agreed that proof that he was wrongfully convicted was essential to his claim." (Resp.Br. 43.)

> validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.

Muhammad v. Close, 540 U.S. at 751 (emphasis added).

Because any action that challenges the sole evidence supporting a criminal conviction "implicitly" questions the validity of conviction, respondents' reliance on the word "necessarily" is misplaced and entirely irrelevant to the proper accrual rule.

The present case presents an even stronger case than *Heck* for finding that success on petitioner's claim (before his conviction had been reversed and all charges dismissed) would "implicitly question the validity of conviction." Here, petitioner's claim is that he suffered "the 'injury' of being convicted and imprisoned," *Heck*, 512 U.S. at 487 n.7, because respondents violated the Fourth Amendment by exploiting petitioner's unlawful arrest to secure a false confession. Aside from statements allegedly made by "unknown individuals" (J.A. 9), petitioner's confession was the only evidence that linked him to the homicide for which he was held in custody for eight and a half years.[2]

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2. Respondents misread the record when they assert that "at least two witnesses placed petitioner at the crime scene, including one who told the police that he saw petitioner running from the scene after hearing shots." (Resp.Br. 21 n.10.)

First, the eyewitness who testified at trial could not

Petitioner's conviction was overturned for the second time when the state appellate court held that petitioner's confession was the tainted fruit of his unlawful arrest. Thereafter, the prosecution dismissed criminal charges against petitioner because it had no other evidence.[3] Thus, the consequences of success on petitioner's Fourth Amendment claim are clear and indisputable: success on petitioner's §1983 claim before criminal charges were dismissed would have "necessarily impl[ied] the invalidity of his conviction." *Heck*, 512 U.S. at 487.

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identify petitioner as the man he had seen commit the homicide. (J.A. 10.)

Second, other witnesses could only be identified by respondent Roy as "unknown individuals." (J.A. 9.) It is not surprising that the prosecution was unable to call any of these "unknown individuals" at trial.

3. The prosecutor submitted an affidavit in support of respondents' motion for summary judgment, stating that charges would be refiled against petitioner "if additional evidence against him is obtained." (Resp.Br. 2.) This claim was an empty boast because the prosecution failed to obtain any such "additional evidence" in the thirteen month period that elapsed between the second reversal by the state appellate court on August 31, 2001 and the dismissal of criminal charges on October 10, 2002.

B. The Word "Necessarily" Does Not Foreclose Case by Case Determinations

Respondents and amici contend that by using the word "necessarily," the Court in *Heck* intended to foreclose case by case determinations of whether success on a §1983 claim would impugn the integrity of a criminal conviction.[4] This argument cannot be squared with the purpose of *Heck*—to avoid collateral attacks on criminal convictions through a civil damage proceeding—nor with the Court's use of "necessarily" in its decisions distinguishing "structural error," which "necessarily render[s] a trial fundamentally unfair," *Rose v. Clark*, 478 U.S. 570, 577 (1986), from the case by case determination of whether a particular error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

A Fourth Amendment claim which would negate an element of the offense charged, as the Court envisoned in note 6 in *Heck*, is akin to the "structural error" of depriving a criminal defendant of counsel of his (or her) choice that requires reversal of a criminal conviction without assessment of prejudice. *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557, 2564-65 (2006). A Fourth Amendment claim that requires an assessment of whether success on the claim would impugn the integrity of a conviction is analogous to the "wide range of errors," *Arizona v. Fluminante*, 499

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4. Resp.Br. 18-21; State of Illinois Br. 7-11; Nat'l League of Cities Br. 8-17.

U.S. 279, 306 (1991), subject to case by case harmless error analysis.

In all circuits save the Seventh Circuit, courts routinely make a case by case determination of whether success on a Fourth Amendment claim would "necessarily" invalidate a conviction.[5] This commonsense

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5. Respondents erroneously argue that First, Eighth, Tenth, and Eleventh circuits follow the "categorical rule" adopted by the Seventh Circuit in this case. (Resp.Br. 19 n.9.)

Respondents' view of the state of the law in the First Circuit is not shared by district courts in that circuit. *See, e.g., Sholley v. Town of Holliston*, 49 F.Supp.2d 14, 18-19 (D.Mass. 1999) (Fourth Amendment claim barred by *Heck* because success on that claim would undermine criminal conviction); *Davis v. Schifone*, 185 F.Supp.2d 95, 100 (D.Mass. 2002) (same).

Respondents misread *Moore v. Sims*, 200 F.3d 1170 (8th Cir. 2000). There, the claim was that following an arrest without probable cause, the officer had planted drugs on the arrestee. Id. at 1171. The Eighth Circuit held that the "planting evidence" claim was barred by *Heck*, but that a claim based on the arrest—which had not yielded any incriminating evidence—was not. Id. at 1171-72. Respondents also miscite *Anderson v. Franklin*, 192 F.3d 1125 (8th Cir. 1999) as supporting "the same rule embraced by the Seventh Circuit below." (Resp.Br. 19 n.9.) In *Anderson*, the Eighth Circuit affirmed the dismissal of a §1983 false arrest claim as barred by *Heck* because the claimant "has made no showing that his conviction or sentence has been rendered invalid." 192 F.3d 1131.

reading of *Heck* to require case by case determinations has proved to be workable and easily understandable by both the bench and bar.

C. The Accrual Rule Established in *Heck v. Humphrey* Does Not Turn on the Availability of Federal Habeas Relief

Respondents offer the novel argument that the accrual rule of *Heck v. Humphrey* does not apply to §1983 claims arising under the Fourth Amendment because *Heck* only applies to claims which are cognizable in federal habeas corpus proceedings. (Resp.Br. 24-26.) It is not surprising that respondents are unable to cite a single case that has adopted this meritless

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Respondents are in error in asking the Court to ignore footnote three in *Laurino v. Tate,* 220 F.3d 1213, 1217 n.3 (10th Cir. 2000) (*Heck* barred petitioner's false arrest claim until his conviction was invalidated because "all the evidence to be presented was obtained as the result of an illegal arrest") because the Tenth Circuit "miscited" one of its earlier cases. Respondents are also mistaken in reading *Hughes v. Lott,* 350 F.3d 1157 (11th Cir. 2003) as supporting the categorical rule adopted by the Seventh Circuit in this case: The Eleventh Circuit remanded in *Hughes* because the district court had not determined whether "a successful §1983 action for unreasonable search and seizure *necessarily* implied the invalidity of those convictions." *Id.* at 1161 (emphasis in original). This fact specific inquiry is quite different from the categorical rule adopted by the court of appeals in this case.

theory.[6]

Respondents' argument does not make sense in the context of this case, where petitioner has never had any need to seek federal habeas relief because he successfully challenged his conviction on direct appeal. Respondents' proposed limitation on the *Heck* accrual rule would bar any claimant whose conviction was overturned on direct appeal from asserting a §1983 claim because his claim would not be cognizable in a federal habeas proceeding. Petitioner shows below that application of the *Heck* accrual rule in this case is consistent with the nature of petitioner's §1983 claim.

D. Success on Petitioner's Cause of Action Would Have Necessarily Invalidated Any Conviction

Respondents are mistaken in seeking to characterize petitioner's §1983 claim as limited to a challenge to his arrest. (Resp.Br. 38-42.) This is incorrect: Petitioner's cause of action is for "damages attributable to an unconstitutional conviction or sentence." *Heck v.*

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6. This argument is based on a misreading of the record in *Heck*, which shows that the claimant had characterized his claim as arising under "the Fourth and Fourteenth Amendments to the United States Constitution." *Heck v. Humphrey*, No. 93-6188, Joint Appendix 3-4. Heck's Fourth Amendment claim belies respondent's assertions that "Heck asserted no Fourth Amendment claim" (Resp.Br. 43), and "*Heck's* rule of delayed accrual is inapplicable to Fourth Amendment claims." (Resp.Br. 24.)

Humphrey, 512 U.S. 477, 489-90 (1994).

To establish his §1983 claim, petitioner has shown that he was arrested without probable cause, that respondents exploited the unconstitutional arrest to secure a confession, that the confession was introduced at petitioner's criminal trial, and that petitioner was in custody for eight and a half years until, after his confession had been suppressed as the "tainted fruit" of his unconstitutional arrest, the criminal charges were dismissed because, aside from the confession, the prosecution did not have any other evidence probative of petitioner's guilt.

Until his criminal case had been successfully concluded, petitioner could not, without collaterally attacking his conviction, prove that he was unlawfully in custody. Petitioner shows below that respondents' arguments to the contrary are based on the erroneous view that petitioner's cause of action "was complete" when he was arrested.

E. Petitioner's Cause of Action Was Not "Complete" When He Was Unlawfully Arrested

Respondents seek to characterize petitioner's §1983 cause of action as "complete" at the instant they unlawfully arrested him. (Resp.Br. 10.) To support this mischaracterization of petitioner's claim, respondents endorse the Seventh Circuit's view that the Fourth Amendment "drops out of the picture following a person's initial appearance in court," *Hernandez v. Sheahan,* 455 F.3d 772, 777 (7th Cir. 2006), arguing that their responsibility for unlawfully arresting and exploiting the arrest to secure a confession ended when a judge (relying on the confession) set bail. The basis

for this remarkable contention is that "the arrestee [was] then no longer in the detectives' custody." (Resp.Br. 16.) According to respondents, their responsibility for any constitutional violation "was complete once petitioner left their custody." (Resp.Br. 17.) The Court should reject this meritless argument.

Liability under §1983 for the harm caused by exploiting an unlawful arrest to obtain a confession should not turn on concepts of "custody." While a person must be in "custody" to obtain habeas relief, *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968), the concept of "custody"—like that of exhaustion of state remedies—has nothing to do with §1983.

Equally without merit is any suggestion that the setting of bond was an "intervening act" that ended respondents' liability. In *Malley v. Briggs*, 475 U.S. 335 (1986), the Court reaffirmed that a wrongdoer's liability in §1983 actions extends to "the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Accordingly, a police officer who executes a warrant that he (or she) should know was invalid cannot avoid liability by arguing that "the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest."[7] *Malley*, 475 U.S. at 344 n.7.

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7. Nothing in *Malley v. Briggs* suggests that the information submitted to the judge was anything other than a "fair statement of the facts." DAN B. DOBBS, THE LAW OF TORTS 1218 (2001). The contrary suggestion in *Egervary v. Young*, 366 F.3d 238, 248 (3d Cir. 2004) is in error.

Nor are respondents insulated from liability for their wrongdoing because testimony at trial about the confession "was adduced through the Assistant State's Attorney who obtained a written confession from Petitioner after the oral confession in question." (Cook County Br. 6 n.1.) Respondent Kato taught petitioner the story to tell the prosecutor and instructed petitioner not to tell the prosecutor about Kato's promise that petitioner could go home after talking to the prosecutor. Sworn Declaration of Andre Wallace, Exhibit 1 to Record Item No. 31, par. 14(xii).

Respondents correctly point out that criminal cases are not prosecuted by police officers, but by county prosecutors. (Resp.Br. 43, 44 n.23.) While this is true, it is of no consequence when, as in this case, the prosecutor's decision to go forward was based solely on the false confession that respondents had unlawfully obtained. *Jones v. City of Chicago,* 856 F.2d 985, 994 (7th Cir. 1988). Here, the prosecution was "the natural consequence" of respondents' actions, for which they are liable under §1983. *Monroe,* 365 U.S. at 187.

Respondents also seek to compare their conduct in exploiting an unlawful arrest to obtain a false confession with that of an officer who finds contraband while conducting an unlawful search. (Resp.Br. 48.) This comparison is inapt.

The "background of tort liability," *Monroe,* 365 U.S. at 187, prevents a §1983 claimant from being rewarded for his (or her) own misconduct. Thus, a person who "negligently or intentionally" drives into a roadblock—even one that had been erected without probable cause to stop—may not recover damages

under §1983. *Brower v. County of Inyo,* 489 U.S. 593, 599 (1989). Similarly, a person found to be in possession of contraband that is uncovered during an unlawful search is not entitled to damages for being incarcerated until the unlawfully seized evidence is suppressed. *See, e.g., Hector v. Watt,* 235 F.3d 154 (3d Cir. 2000). Arresting a person so that he (or she) may be subjected to coercive interrogation and then holding that person in custody because the interrogation elicited a false confession is quite different than finding contraband during an unlawful search.

Equally inapt is the attempt by amicus (State of Illinois Br. 10-11), to compare this case to *Hudson v. Michigan,* 126 S.Ct. 2159 (2006), where the Court concluded that police officers' failure to "knock and announce" before executing a search warrant did not require the suppression of evidence. *Id.* at 2166-68. Petitioner agrees that a §1983 claim seeking *only* those damages proximately caused by the failure to "knock and announce" would accrue at the time of the unlawful entry. The same would not be true, however, if the claim was that, in addition to the unlawful entry, the police officers had made material false statements to secure the search warrant. *See, e.g., Berman v. Turecki,* 885 F.Supp. 528, 532 (S.D.N.Y. 1995). Success on such a claim would constitute a collateral attack on the criminal conviction and would be barred by *Heck. Id.*

Respondents are also mistaken in characterizing petitioner's cause of action as involving "unwarranted prosecution." (Resp.Br. 5.) While petitioner agrees that he was wrongfully prosecuted, the core of his constitutional claim is that he was subjected to an

involuntary seizure of his person from the date of his arrest until eight and a half years later when, after charges had been dismissed, he was released from custody. As the Fourth Circuit has recognized, these facts state "a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort." *Lambert v. Williams,* 223 F.3d 257, 261 (4th Cir. 2000). Petitioner responds below to respondents' argument that the common law actions of false imprisonment and malicious prosecution are not appropriate starting points for petitioner's §1983 action for damages arising from an unconstitutional conviction.

II. Petitioner's §1983 Action Should Not Be Placed in the Straitjacket of Common Law Forms of Action

Respondents are mistaken in seeking to characterize petitioner's §1983 claim as a common law cause of action for false arrest and imprisonment. (Resp.Br. 38-42.) Petitioner brings the claim which the Court referred to in *Heck v. Humphrey,* 512 U.S. 477 (1994), when it wrote that §1983 provides a "cause of action for damages attributable to an unconstitutional conviction or sentence." Id. at 489-90.

Although the Court had no need in *Heck* to identify the elements of such a cause of action, the Court's recent decision in *Hartman v. Moore,* 126 S.Ct. 1695 (2006) shows that the common law is a mere "starting point," *Carey v. Piphus,* 435 U.S. 247, 258 (1978), for identifying the elements of a cause of action for damages attributable to an unconstitutional conviction or sentence. While the Court has made plain that it is "ready to look at the elements of common-law torts

. . . the common law is best understood here more as a source of inspired examples than of prefabricated components of [§1983] torts." *Hartman,* 126 S.Ct. at 1702.

It was in the context of "inspired examples" that petitioner discussed the common law actions of false imprisonment and malicious prosecution in his opening brief. Respondents take a different approach, and ask the Court to view petitioner's §1983 claim as a common law cause of action for false arrest as that cause of action has been construed in *Broughton v. State of New York,* 37 N.Y.2d 451, 335 N.E.2d 310 (1975) and *Asgari v. City of Los Angeles,* 15 Cal.4th 744, 63 Cal.Rptr.2d 842 (1997). These two relatively recent decisions adopt the dichotomy between false imprisonment and malicious prosecution to which the Court referred in *Heck,* 512 U.S. at 484. Earlier cases, however, followed a different rule.

In *Boaz v. Tate,* 43 Ind. 60, 1873 WL 5266 (1873), a case decided shortly after the enactment of what is now 42 U.S.C. §1983, the Indiana Supreme Court considered the distinction between false imprisonment and malicious prosecution. There, the plaintiff had been arrested without a warrant and without probable cause. After bail had been set, the defendants refused to accept bail and caused other false charges to be filed against the plaintiff. The Indiana Supreme Court held that action was for "false imprisonment, and not for malicious prosecution," because the "the gravamen of the action is for arresting and imprisoning the plaintiff without legal process, and the averments relative to the malicious purposes of the defendants and the circumstances of the arrest and imprisonment are only by

way of aggravation." 1873 WL 5266 *2.

In the same time period, the Wisconsin Supreme Court upheld an award of damages for "mental anguish, pain, suffering, insult, and indignity resulting from . . . imprisonment" in a false imprisonment action. *Fenelon v. Butts,* 53 Wis. 344, 10 N.W. 501, 502 (1881), *appeal following remand for new trial,* 49 Wis. 342, 5 N.W. 784 (1880). The same rule was more recently applied by the Wisconsin Supreme Court in *Lane v. Collins,* 29 Wis.2d 66, 77, 138 N.W.2d 264, 270 (1965), where the court held that "attorney's expenses and mental distress[] are compensable damages in a false imprisonment action." 29 Wis.2d at 77, 138 N.W.2d at 270.

Respondents alternatively argue that the common law action for malicious prosecution is an inappropriate starting point for analyzing petitioner's §1983 cause of action because the state criminal proceedings were not dismissed on grounds of actual innocence. (Resp.Br. 42.) Actual innocence, though, is not uniformly required to establish the "favorable termination" element of a malicious prosecution claim.

As analyzed by the Connecticut Supreme Court in *DeLaurentis v. City of New Haven,* 220 Conn. 225, 250, 597 A.2d 807, 820 (1991), courts have adopted three approaches to the "favorable termination" element. The first requires a verdict of acquittal; the second requires the plaintiff to show that the criminal case had been discontinued on grounds consistent with innocence; the third approach is to accept any outcome other than a finding of guilty, without any plea or consideration from the criminal defendant. This third

approach is the appropriate "favorable termination" standard for a §1983 action brought to obtain damages attributable to an unconstitutional conviction.

The lack of uniformity in the false imprisonment and malicious prosecution cases makes plain that the elements for a §1983 action for damages attributable to an unconstitutional conviction or sentence cannot be identical to those of the common law forms of action. The accrual question presented in this case should be resolved in a manner that reflects the constitutional wrongdoing and which effectuates the purposes of §1983: the cause of action that starts with an unlawful arrest and involves a prosecution based on a confession obtained by exploiting the unlawful arrest should not accrue at the time of arrest "when the defendant commits his wrong," but accrue "when substantial harm matures," *Developments in the Law: Statutes of Limitations,* 63 Harv.L.Rev. 1177, 1200 (1950), i.e., when criminal proceedings have been resolved in favor of the the arrestee.[8]

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8. This rule of accrual is not consistent with respondents' erroneous claim, asserted without the citation of any authority, that "the existence of a potential preclusion defense has never prevented a claim from accruing for purposes of the applicable statute of limitations." (Resp.Br. 12.) Petitioner's proposed rule of accrual is, however, consistent with the accepted and ordinary view that "the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." *Dillon v. Board of Pension Commissioners,* 18 Cal.2d 427, 431, 116 P.2d 37, 39 (1941). *Dillon* is often

III. Respondents' "Stay" Approach Is Inferior to the *Heck* Delayed Accrual Rule and Would Yield Anomalous Results

Respondents assert that the *Heck* accrual rule implicates problems of stale and unavailable evidence that limitations periods are designed to avoid. (Illinois Br. 20.) The same issues would arise, however, under the "stay" approach advocated by amicus (Illinois Br. 20-21), when a §1983 action is placed on an "inactive" docket until the final adjudication of a criminal case. The "stay" approach also flouts the reality that all of the evidence relevant to the §1983 claim will be presented when that same claim is raised in the criminal proceedings. The "stay" approach merely encourages preemptive filings and, if adopted, would clog the already crowded docket of the district courts.

There is also no data to show that the case by case rule applied outside of the Seventh Circuit has opened the floodgates to a plethora of Fourth Amendment claims in those circuits. The assertion by amicus (Nat'l League of Cities Br. 4), that the case by case determination is fraught with "uncertainty" is mere

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cited for the proposition that limitations periods are delayed when a claim is precluded by some other legal process. *See, e.g., Versluis v. Town of Haskell, Okl.*, 154 F.2d 935 (10th Cir. 1946); *Belfer v. Building Com'r of Boston*, 363 Mass. 439, 294 N.E.2d 857 (1973); *CAMAS Colorado, Inc. v. Board of County Com'rs*, 36 P.3d 135 (Colo.App., 2001).

hyperbole: There is no uncertainty that a successful challenge to the lawfulness of an arrest in cases like *Ker v. Illinois*, 119 U.S. 436, 444 (1886) and *Frisbie v. Collins*, 342 U.S. 519 (1952) would not impugn the integrity of a conviction. Nor should there be uncertainty "where the only evidence supporting the conviction is tainted by a possible constitutional violation," *Gibson v. Superintendent of New Jersey Dept. of Law*, 411 F.3d 427, 452 (3d Cir. 2005), as in this case. The latter challenge would be a collateral attack on a criminal conviction.

In respondents' view, "because both filings will be premised on the same allegations," (Resp.Br. 46), petitioner should have filed a §1983 action challenging his arrest when he filed his motion to suppress in the criminal case. Respondents acknowledge that the damages recoverable while the criminal case is pending would be severely limited: A jury would likely award no more than nominal damages. *See, e.g., Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006). Nonetheless, respondents offer the remarkable suggestion that, had petitioner followed this course, he would have somehow been able to obtain "additional damages" after his conviction was reversed. (Resp.Br. 14 n.5.) This argument ignores the timing of this case.

Under respondent's rule, petitioner should have filed a §1983 action against respondents within two years (the duration of the statute of limitations in Illinois for §1983 claims), of his arrest. Because petitioner was under the age of 18 when arrested, he could benefit from the Illinois tolling rule and, using respondents' rule, file his §1983 lawsuit anytime before November 7, 1999, when he became twenty years of

age.

If petitioner had filed his §1983 lawsuit before his trial (which commenced on April 19, 1996)—under respondents' rule that the cause of action had accrued notwithstanding the pendency of the criminal case—the federal action would have been stayed until the conclusion of petitioner's trial. Petitioner was sentenced on May 23, 1996; at that time, the final judgment in the criminal trial would "be res judicata or serve as a basis for an estoppel by judgment, even though such judgment is being appealed." *Wiseman v. Law Research Service, Inc.*, 133 Ill.App.2d 790, 792, 270 N.E.2d 77, 79 (1971). Because state law determines application of res judicata and collateral estoppel in §1983 cases, *Allen v. McCurry*, 449 U.S. 90, 101 (1980), the federal district court considering the §1983 action would be obligated to dismiss the civil rights action.

It was not until September 21, 1998—more than four years after petitioner was arrested—that the state appellate court reversed petitioner's conviction and remanded the case for an attenuation hearing. Petitioner, because less than two years had elapsed from his eighteenth birthday, could still file a §1983 action against respondents, but the civil rights action would be foreclosed shortly after the attenuation hearing on July 21, 1999, when the trial judge reinstated the conviction.

Another two years elapsed before the state appellate court again reversed petitioner's conviction on August 31, 2001, and thirteen months would pass before the prosecution recognized that it had no evidence other than the suppressed confession and dismissed the

criminal case on October 10, 2002. Thus, under respondent's rule, petitioner would have improperly lost his civil claim based on incomplete criminal proceedings that eventually vindicated his view of the false confession. Such an unjustifiable result is avoided by the accrual rule the Court crafted in *Heck*.

CONCLUSION

For the reasons above stated and those previously advanced, the Court should reverse the Seventh Circuit and hold that when a plaintiff in a §1983 action claims that police officers exploited an unlawful arrest to obtain evidence which is the basis for a criminal prosecution, the cause of action arising from the unlawful arrest does not accrue until the criminal charges have been resolved in favor of the arrestee.

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Respectfully submitted.

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